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Saiman bin Umar v Lembaga Pertubuhan Peladang and another appeal

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FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NOS 01(f)-16–06 OF 2014 (J) AND J-01–114–2011
ARIFIN ZAKARIA CHIEF JUSTICE, RAUS SHARIF PCA, AHMAD MAAROP, APANDI ALI AND AZAHAR MOHAMED FCJJ
8 OCTOBER 2015

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Civil Procedure — Pleadings — Effect of general traverse — Respondent alleged in statement of defence that it called, without success, crucial witness to testify in disciplinary proceedings against appellant — Appellant did not admit respondent's said allegation but by way of general traverse denied each and every allegation in statement of defence — Whether appellant consequently denied respondent's allegation that disciplinary investigation committee ('IC') was established — Whether appellant could not subsequently argue respondent did form IC to record evidence from witnesses behind his back and denied him opportunity to be heard — Whether appellant and court bound by the pleadings — Whether appellant bore burden throughout to prove his claim on balance of probabilities — Whether burden not on respondent to prove IC in fact established

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The respondent, a body corporate established under the Farmers' Organisation Authority Act 1973 had employed the appellant for 28 years and three months before it dismissed him for misconduct. The respondent issued the appellant a show-cause letter alleging that he had borrowed a sum of money from a contractor ('Madzlan') when the appellant was the respondent's general manager. That same letter charged the appellant for (a) behaving in a way that raised suspicion that he had used his official position for his own benefit and (b) putting himself in a position of financial obligation with someone who had official business with the respondent. The show-cause letter referred to reg 28 of the respondent's disciplinary rules and specifically stated that the disciplinary breach complained of carried the punishment of dismissal. The appellant was required to submit his representation letter in reply to the charges within 14 days. In his written reply, the appellant denied receiving any money from Madzlan and he enclosed a letter and a statutory declaration ('SD') allegedly made by Madzlan denying that he had lent the appellant the money mentioned in the show-cause letter. The respondent's disciplinary committee ('DC') subsequently informed the appellant that after considering his representation it had found him guilty of the charges. Thereafter, the appellant was dismissed from service. The appellant appealed to the respondent's disciplinary appeal board contending that a hearing should have been held before a decision was taken to dismiss him. He alleged he was not given an

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opportunity to cross-examine witnesses or to scrutinise relevant documents. The appeal board affirmed the decision of the DC. The appellant then filed an action in the High Court praying, inter alia, for a declaration that his dismissal was null and void and for an order that he be reinstated to his post and compensated for all arrears of salaries, allowances and emoluments that had been denied him. The High Court found for the appellant holding, inter alia, that the respondent had breached the rules of natural justice in not holding a hearing and affording the appellant an opportunity to be heard. The Court of Appeal ('COA') reversed that decision ruling that the appellant was given reasonable opportunity to be heard as he was given two months to reply to the charges in the show-cause letter and that the respondent had duly complied with all the disciplinary procedures. The leave question posed in the instant appeal against the COA's decision was whether an investigation committee ('IC') appointed under reg 28(4) of the respondent's disciplinary rules could conduct further investigation and call for and take evidence without the appellant's knowledge and without affording him an opportunity to cross-examine or produce witnesses or to challenge the evidence or give further explanation to the IC. The leave question stemmed from the fact that in paras 8.1 and 8.2 of its statement of defence, the respondent had admitted that it had called for Madzlan to come forth and explain the letter and SD he had allegedly given in support of the appellant's case but Madzlan had failed to do so. This, the appellant contended, could only have been possible if the respondent had already formed an IC under reg 28(4) of the disciplinary rules to obtain further clarification and to hear witnesses, and if that was the case, he was never informed of the IC's inquiry dates and times and therefore was denied the opportunity to be heard in breach of both the rules of natural justice and the respondent's disciplinary rules.

Held, dismissing the appeal:

(1) No report of the alleged IC was ever adduced in evidence. The High Court factually found no evidence that an IC was appointed. A person who asserted the existence of any fact must prove that the fact existed (see paras 34–35).

(2) Under reg 28(4) of the respondent's disciplinary rules, the DC could appoint an IC if it was of the opinion that the case against the officer required further clarification. In a disciplinary proceeding under reg 28, an opportunity to be heard orally only arose under reg 28(4) at the IC stage. It was only if an IC was appointed, because the DC required further clarification, that the officer would be afforded the opportunity of giving oral testimony to exculpate himself; and under reg 28(7), if witnesses were called and examined by the IC, the officer would be allowed to be present and to cross-examine the witnesses and no documentary evidence could be used against the officer unless he had previously been supplied with a copy of the evidence (see paras 27–29).

(3) The respondent's averments in paras 8.1 and 8.2 of its statement of defence ultimately had no bearing on the appellant's case. The fact that the respondent had pleaded in that fashion did not alter the fact that the appellant's pleaded case was his dissatisfaction with the non-formation of the IC. However, now, before this court, he tried to argue something quite different from his pleaded case without even the support of evidence. His position before this court was that an IC was established and that he was not called upon to attend it. Parties to an action were bound by their pleadings and it was trite law that the court should not decide an issue not pleaded (see paras 38, 41 & 50).

(4) Paragraphs 8.1 and 8.2 of the respondent's statement of defence were tellingly denied by the appellant at para 5 of his reply to the statement of defence by way of a general traverse which stated that except for what had been previously admitted, each and every allegation contained in the statement of defence was denied. The obvious consequence of that was to deny the respondent's factual allegation that an IC was in fact established. As a result of that general traverse, the onus of proof did not shift to the respondent to prove that the IC was in fact established. From the outset, it was upon the appellant himself, and not the respondent, to discharge the overall burden of proving his case and to satisfy the court on balance of probabilities that his pleaded claim was well-founded before the court could grant judgment in his favour. The stand taken by the respondent not to prove the said averments was its choice. That did not absolve the appellant from discharging the overall burden of proving his claim (see paras 42, 43, 47 & 48).

[Bahasa Malaysia summary

Responden, badan korporat yang ditubuhkan di bawah Akta Lembaga Pertubuhan Peladang 1973 telah mengambil perayu berkerja untuk 28 tahun dan tiga bulan sebelum memecatnya kerana salah laku. Responden mengeluarkan kepada perayu surat tunjuk sebab mendakwa bahawa dia meminjam wang daripada kontraktor ('Madzlan') semasa perayu adalah pengurus besar responden. Surat yang sama menuduh perayu kerana (a) berkelakuan dengan cara yang menimbulkan rasa syak bahawa dia telah menggunakan kedudukan rasminya untuk faedahnya sendiri dan (b) meletakkan dirinya dalam kedudukan tanggungjawab kewangan dengan seseorang yang mempunyai perniagaan rasmi dengan responden. Surat tunjuk sebab merujuk kepada peraturan 28 peraturan-peraturan tatatertib responden dan secara spesifik menyatakan bahawa kemungkiran tatatertib yang diadukan membawa kepada hukuman pembuangan kerja. Perayu dikehendaki untuk menyerahkan surat representasinya dalam menjawab kepada tuduhan-tuduhan dalam masa 14 hari. Dalam jawapan bertulisnya, perayu menafikan menerima apa-apa wang daripada Madzlan dan dia melampirkan surat dan perisytiharan statutori ('PS') yang didakwa dibuat oleh Madzlan yang

menafikan bahawa dia telah memberikan kepada perayu wang yang disebut di dalam surat tunjuk sebab tersebut. Jawatankuasa tatatertib ('JT') kemudiannya memberitahu perayu bahawa selepas mempertimbangkan representasinya ia telah mendapati yang perayu bersalah terhadap tuduhan-tuduhan tersebut. Perayu, kemudiannya dibuang daripada perkhidmatan. Perayu merayu kepada lembaga tatatertib responden berhujah bahawa pendengaran patut diadakan sebelum keputusan diambil untuk membuangnya. Dia mendakwa yang dia tidak diberi peluang untuk memeriksa balas saksi-saksi atau meneliti dokumen-dokumen yang relevan. Lembaga rayuan mengesahkan keputusan JT. Perayu kemudiannya memfailkan tindakan di Mahkamah Tinggi memohon, antara lain, untuk perisytiharan bahawa pembuangan kerjanya adalah tak sah dan batal dan untuk perintah yang dia dikembalikan kerja semula kepada jawatannya dan pampasan untuk kesemua tunggakan gaji, elaun dan emolumen yang dinafikan terhadapnya. Mahkamah Tinggi memihak kepada perayu memutuskan, antara lain, bahawa responden telah memungkiri peraturan-peraturan keadilan semulajadi dalam tidak membuat pendengaran dan memberikan perayu peluang untuk didengar. Mahkamah Rayuan ('MR') mengakas keputusan tersebut dengan memutuskan bahawa perayu diberi peluang yang munasabah untuk didengar kerana dia diberi masa selama dua bulan untuk menjawab kepada tuduhan-tuduhan di dalam surat tunjuk sebab tersebut dan bahawa responden telah mematuhi dengan wajar kesemua prosedur tatatertib. Soalan izin yang dikemukakan dalam rayuan ini terhadap keputusan MR adalah sama ada jawatankuasa siasatan ('JP') dilantik di bawah peraturan 28(4) peraturan-peraturan tatatertib responden boleh menjalankan siasatan lanjut dan meminta dan memanggil keterangan tanpa pengetahuan perayu dan tanpa memberikannya peluang untuk memeriksa balas atau mengemukakan saksi-saksi untuk mencabar keterangan atau memberi penjelasan lanjut kepada JP tersebut. Soalan izin yang berbangkit daripada fakta dalam perenggan 8.1 dan 8.2 pernyataan pembelaannya, responden telah mengaku yang ia telah memanggil Madzlan untuk datang dan menjelaskan mengenai surat dan PS yang dia didakwa memberi dalam menyokong kes perayu tetapi Madzlan telah gagal berbuat sedemikian. Perayu berhujah bahawa ini hanya berkemungkinan jika responden telah membentuk JS di bawah peraturan 28(4) peraturan-peraturan tatatertib untuk mendapatkan penjelasan lanjut dan untuk mendengar saksi-saksi, dan jika ia adalah sebegitu, dia tidak pernah diberitahu mengenai tarikh-tarikh dan masa siasatan JS dan oleh itu dinafikan peluang untuk didengar dalam kemungkiran kedua-dua peraturan-peraturan keadilan semulajadi dan peraturan-peraturan tatatertib responden.

Diputuskan, menolak rayuan:

(1) Tiada laporan mengenai JS yang didakwa pernah dikemukakan dalam keterangan. Mahkamah Tinggi secara nyata mendapati tiada keterangan bahawa JS telah dilantik. Seorang yang menegaskan kewujudan

mengenai apa-apa fakta mesti membuktikan bahawa fakta tersebut wujud (lihat perenggan 34–35).

(2) Di bawah peraturan 28(4) peraturan-peraturan tatatertib responden, JT boleh membentuk JS jika ia berpendapat bahawa kes terhadap pegawai memerlukan penjelasan lanjut. Dalam prosiding tatatertib di bawah peraturan 28, peluang untuk didengar secara lisan hanya berbangkit di bawah peraturan 28(4) pada peringkat JS. Ia hanya jika JS dilantik, kerana JT memerlukan penjelasan lanjut, bahawa pegawai akan diberikan peluang memberi keterangan lisan untuk membersihkan dirinya; dan di bawah peraturan 28(7), jika saksi-saksi dipanggil dan diperiksa oleh JS, pegawai tersebut akan dibenarkan untuk hadir dan memeriksa balas saksi-saksi dan tiada keterangan dokumentar boleh digunakan terhadap pegawai tersebut kecuali dia telah sebelumnya diberikan salinan keterangan tersebut (lihat perenggan 27–29).

(3) Penegasan responden dalam perenggan 8.1 dan 8.2 pernyataan pembelaannya pada asasnya tidak mempunyai kesan ke atas kes perayu. Fakta bahawa responden telah memplid sedemikian tidak mengubah fakta bahawa kes rayuan perayu adalah ketidakpuasan hatinya dengan tidak terbentuknya JS tersebut. Walau bagaimanapun, pada ketika ini, di hadapan mahkamah, dia cuba menghujah sesuatu yang sangat berbeza daripada kes rayuannya tanpa sokongan keterangan. Kedudukannya di hadapan mahkamah ini adalah bahawa JS ditubuhkan dan bahawa dia tidak dipanggil untuk menghadirkan diri. Pihak-pihak kepada tindakan adalah terikat dengan pliding mereka dan adalah undang-undang yang ditetapkan bahawa mahkamah tidak patut memutuskan isu yang tidak diplidkan (lihat perenggan 38, 41 & 50).

(4) Perenggan 8.1 dan 8.2 pernyataan pembelaan responden jelas dinafikan oleh perayu pada perenggan 5 jawapannya kepada pernyataan pembelaan tersebut melalui perundingan am yang menyatakan bahawa kecuali apa yang telah diakui sebelumnya, setiap dakwaan yang terdapat di dalam pernyataan pembelaan dinafikan. Akibat jelas daripadanya adalah untuk menafikan dakwaan fakta responden bahawa JS sebenarnya telah ditubuhkan. Akibat daripada perundingan am tersebut, beban pembuktian tidak beralih kepada perayu untuk membuktikan bahawa JS sebenarnya ditubuhkan. Dari awal lagi, ia adalah atas perayu sendiri, dan bukan responden, untuk melepaskan keseluruhan beban pembuktian kesnya dan untuk memuaskan mahkamah atas imbangan kebarangkalian bahawa tuntutan rayuannya adalah berasas sebelum mahkamah boleh memberikan penghakiman memihak kepadanya. Pendirian yang diambil oleh responden untuk tidak membuktikan penegasan tersebut adalah pilihannya. Ini tidak membebaskan perayu daripada melepaskan keseluruhan beban pembuktian tuntutannya (lihat perenggan 42, 43, 47 & 48.]

Notes

For cases on pleadings in general, see 2(4) *Mallal's Digest* (5th Ed, 2015) paras 6761–7633.

Cases referred to

Ambank (M) Bhd v Luqman Kamil bin Mohd Don [2012] 3 MLJ 1; [2012] 3 MLRA 459, FC (refd)

B Surinder Singh Kanda v The Government of The Federation of Malaya [1962] 28 MLJ 169, PC (refd)

Borneo Housing Mortgage Finance Bhd v Personal Representatives of the Estate of Lee Lun Wah Maureen & Anor [1994] 1 MLJ 209; [1994] 1 CLJ 501, HC (refd)

Ganasan a/l Marimuthu v Public Services Commission & Anor [1998] 4 MLJ 280; [1998] 4 CLJ 331, CA (refd)

Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia & Anor [1994] 2 MLJ 114, SC (refd)

Janagi v Ong Boon Kiat [1971] 2 MLJ 196 (refd)

John Lancaster Radiators Ltd v General Motor Radiator Co Ltd and Others [1946] 2 All ER 685, CA (refd)

Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v Setiausaha Suruhanjaya Pasukan Polis & Ors [1995] 1 MLJ 308, CA (refd)

Shamsiah bte Ahmad Sham v Public Services Commission, Malaysia & Anor [1990] 3 MLJ 364, CA (refd)

Syarikat Kemajuan Timbermine Sdn Bhd v Kerajaan Negeri Kelantan Darul Naim [2015] 3 MLJ 609; [2015] 2 CLJ 1037, FC (refd)

Victory Avenue Mfg (M) Sdn Bhd v Matsushita Electronic Devices (M) Sdn Bhd [2009] 5 MLJ 243, HC (refd)

Warner v Sampson [1959] 1 QB 297, CA (refd)

Yew Wan Leong v Lai Kok Chye [1990] 2 MLJ 152; [1990] 1 CLJ (Rep) 330, SC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 78(1)

Farmers' Organization Authority Act 1973

Peraturan-Peraturan Pegawai Lembaga Pertubuhan Peladang (Kelakuan dan Tatatertib) 1994 regs 4(2)(d), (2)(f), 10(1)(a), 12(1)(b), 25, 25(1), (2), 28, 28(1), (4), (7)

Rules of Court 2012

Rules of the High Court 1980 O 18 r 13

Appeal from: Civil Appeal No J-01–114 of 2011 (Court of Appeal, Putrajaya).

Subramaniam Nair (Ebrina Zubir with him) (Maniam Nair & Co) for the appellant.

Fahri Azzat (Rafeeza Hamdan with him) (Azzat & Izzat) for the respondent.

Azahar Mohamed FCJ

INTRODUCTION

[1] This is an appeal from the judgment of the Court of Appeal that reversed the judgment of the High Court. The appeal arises from an action brought by the appellant, Saiman bin Umar in the High Court against the respondent, Lembaga Pertubuhan Peladang based on the cause of action of unlawful dismissal.

[2] We shall be referring to parties in this judgment as they were in the High Court, namely the appellant as the plaintiff and the respondent as the defendant.

BACKGROUND FACTS

[3] The defendant is a body corporate established under the provisions of the Farmers' Organization Authority Act 1973 ('the Act').

[4] The defendant from 28 December 1973 until 1 March 2002 employed the plaintiff. The plaintiff started his employment with the defendant as a clerk. At the time of his dismissal, that is to say on 1 March 2002, the plaintiff held the post of assistant officer of economics affairs.

[5] On 11 July 2000, the defendant initiated a disciplinary action against the plaintiff by issuing a show cause letter dated 21 June 2000 to him. It was alleged that the plaintiff had borrowed a sum of RM40,000 from a contractor, one Madzlan bin Abd Rahman (Madzlan) on 21 May 1990 while the plaintiff was holding the post of Pengurus Besar Pertubuhan Peladang Kawasan Mersing Utara-Endau, Johor.

[6] In the same show cause letter, the defendant formulated two charges against the plaintiff pursuant to reg 28 of the Peraturan-Peraturan Pegawai Lembaga Pertubuhan Peladang (Kelakuan dan Tatatertib) 1994 ('the disciplinary rules'). The first charge was for behaving in a way that would raise suspicions that the plaintiff was using his official position for his own benefit pursuant to regs 4(2)(c)(ii), 4(2)(d) and 4(2)(f) of the disciplinary rules. The second charge was for putting the plaintiff in a position of financial obligation with someone who had official business with the defendant pursuant to regs 10(1)(a) and 12(1)(b) of the disciplinary rules.

[7] By a letter dated 28 July 2000, the plaintiff requested for documents to enable him to prepare his representation since the alleged misconduct happened ten years earlier. The defendant by a letter dated 7 August 2000

asked the plaintiff to specify the documents, which he required. By a letter dated 8 August 2000, the plaintiff specified the documents, which he required to prepare his representation.

[8] By a letter dated 24 August 2000, the defendant turned down the request of the plaintiff on the ground that the documents requested by him were not relevant to the charges and the plaintiff was instructed to put in his representation letter within fourteen days.

[9] By a letter dated 9 September 2000, the plaintiff made his representation to the show cause letter. The plaintiff denied borrowing or receiving RM40,000 as a loan from Madzlan in answer to the two charges. Together with his representation letter, the plaintiff enclosed a letter allegedly written by Madzlan dated 6 September 2000 and a statutory declaration by Madzlan denying that he lent the plaintiff the said sum.

[10] The defendant's disciplinary committee informed the plaintiff by letter dated 17 May 2001 that they had considered his representation and found him guilty of both charges. In the same letter, the plaintiff was given a right to mitigate within twenty-one days.

[11] On 31 May 2001, the plaintiff replied by stating that he was not satisfied with the disciplinary committee's decision and requested that the decision be reviewed.

[12] On 25 February 2002, the defendant's disciplinary committee informed the plaintiff that after having reviewed and deliberated on the plaintiff's appeal, they decided the plaintiff failed to exculpate himself. The plaintiff was also informed about his dismissal from service with effect from 1 March 2002. In the same letter, the plaintiff was also informed that he could appeal to the Disciplinary Appeal Board within fourteen days.

[13] The plaintiff appealed against the decision to the defendant's Disciplinary Appeal Board on the ground that a hearing was supposed to be held before the decision was passed and he was not given the opportunity to cross-examine witnesses and scrutinise the related documents.

[14] By a letter dated 18 November 2002, the Disciplinary Appeal Board informed the plaintiff that the Disciplinary Appeal Board had on 8 November 2002 affirmed the decision of the disciplinary committee, hence dismissing the appeal.

[15] This then led the plaintiff filing a writ action on the 3 October 2005, at

the Johor Bahru High Court and among others, prayed for:

(a) a declaration that the plaintiff's dismissal by the defendant be declared null and void;

(b) the plaintiff be reinstated to his post and be compensated of all arrears of salaries, and allowances that he was entitled to receive from 1 March 2002 until 10 January 2004; and

(c) the plaintiff is paid a gratuity and pension from 10 January 2004 according to his eligibility.

DECISION OF THE HIGH COURT

[16] On 15 November 2010, the High Court found in favour of the plaintiff. In allowing the plaintiff's claim, the High Court held that the defendant was in breach of the rules of natural justice by not giving the plaintiff an opportunity to be heard when it did not hold a hearing.

[17] The High Court went on to decide that reg 28 of the disciplinary rules must be interpreted vis-à-vis reg 25 and held that by its interpretation, reg 25(2) required the defendant to record in writing the reason why it was not practical to comply with the regulations.

[18] Following from this, the High Court allowed the plaintiff's claim namely that his employment be restored and all arrears in salaries and allowances to be paid to him from 1 March 2002–10 January 2004 (date of retirement) and the consequential reliefs prayed for with costs of RM6,000.

DECISION OF THE COURT OF APPEAL

[19] On appeal, the Court of Appeal reversed the decision of the High Court. The Court of Appeal in allowing the defendant's appeal held that reg 25(1) of the disciplinary rules, which provides that no officer can be dismissed or reduced in rank in any disciplinary proceedings unless he is informed in writing about the intended disciplinary proceedings and that he is given a reasonable opportunity to be heard, had been complied with by the defendant. The plaintiff was served with a show cause letter informing him about the charges preferred and that he was given two months to reply to the said letter before the disciplinary committee finally decided to dismiss him from his employment with the defendant. Relying on the case of *Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia & Anor* [1994] 2 MLJ 114, the Court of Appeal held that from the evidence it was clear that the plaintiff had been given a reasonable opportunity to be heard; the plaintiff was given sufficient time to reply to the show cause letter.

[20] The Court of Appeal held, inter alia, that the defendant had complied with all the procedures. In its ground of judgment the Court of Appeal stated:

> Rule 28(1) discuss on the procedural rules which the disciplinary committee had to fulfill. The learned counsel for the appellant submitted that all the procedures have been complied with. The procedure (in short) is to prepare a set of facts together with the intended punishment and send them to the respondent. The respondent, upon receipt of the documents was to prepare a written representation explaining why such disciplinary action should not be taken against him. It was done so in the instant case.
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> We agree with the submission by the learned counsel for the appellant that the learned Judge's complaints about the failure to record the reason why the investigation committee was not appointed are misplaced.
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> Moreover, the procedure as stipulated under Rule 28(1) had been complied with. Rule 28(4) does not place any requirement to explain in writing, why the investigation committee is not required.Furthermore, there is nothing in the sub-provision that places such burden on them.
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> Therefore, to read the requirements under Rule 25(2)(b) into Rule 28(4) is wrong. It is a clear and an unambiguous provision of the statute and must be given their natural and ordinary meaning see *Hari Bahadur Ghale v Pendakwa Raya* [2012] MLJU 947. Therefore, we find that the learned judge's decision (even not submitted by the parties or pleaded in the pleadings) on this issue is baseless.

THE QUESTION OF LAW ON APPEAL TO THE FEDERAL COURT

[21] On 21 May 2014, the plaintiff's application for leave to appeal was allowed on the following question:

> Can the investigation committee appointed under reg 28(4) of Peraturan-peraturan Pegawai Lembaga Pertubuhan Peladang (Kelakuan dan Tatatertib) 1994 conduct further investigation and call for further evidence without notifying the date and time to the officer under investigation and take evidence behind the back of the officer without affording him a reasonable opportunity to cross examine witnesses or produce any witnesses to rebut, contradict, controvert or explain further to the investigation committee?

[22] The disciplinary proceeding against the plaintiff was carried out under the provisions of reg 28 of the disciplinary rules. It should be stressed that the show cause letter dated 21 June 2000 referred to reg 28, and it specifically stated the breach of discipline complained of against the plaintiff was of a nature, which merits a punishment of dismissal.

[23] As will be explained later in the judgment, for the proper determination of the question posed to us, the issue must be approached on the basis of the following provisions of the disciplinary rules.

[24] First, reg 28(1) of the disciplinary rules, which states: A

> Jawatankuasa Tatatertib yang bersidang untuk menimbangkan suatu kes yang pelanggaran tatatertib yang diadukan adalah didapati daripada jenis yang patut dikenakan suatu hukuman buang kerja atau turun pangkat hendaklah menimbangkan segala maklumat yang ada dan jika didapati bahawa terdapat suatu kes prima facie terhadap pegawai itu untuk dibuang kerja atau diturunkan pangkat, Jawatankuasa Tatatertib hendaklah mengarahkan supaya suatu pernyataan yang mengandungi fakta-fakta pelanggaran tatatertib yang dikatakan telah dilakukan oleh pegawai itu dan apa-apa alasan yang dicadangkan yang berdasarkannya pegawai itu hendak dibuang kerja atau diturunkan pangkat dihantarkan kepada pegawai itu dan pegawai itu hendaklah diminta membuat suatu representasi bertulis, yang mengandungi alasan-alasan yang berdasarkannya pegawai itu bergantung untuk membebaskan dirinya, dalam tempoh tidak kurang daripada dua puluh satu hari dari tarikh penerimaan pertuduhan itu.

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[25] In essence, reg 28(1) generally provides that the disciplinary committee shall, after considering all the available information in its possession that there is a prima facie case for dismissal or reduction in rank, cause to be sent to the officer a statement in writing, of the ground or grounds on which it proposes to dismiss the officer or reduce him in rank and shall call upon him to state in writing within a period of not less than twenty-one days from the date of receipt of the letter a representation containing grounds upon which he relies to exculpate himself. As indicated earlier, on 21 June 2000, the defendant's disciplinary committee wrote to the plaintiff informing him of the decision to institute disciplinary proceedings against the plaintiff under reg 28 of the disciplinary rules.

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[26] Second, reg 28(4), which prescribes, with the necessary emphasis:

> Jika Jawatankuasa Tatatertib berpendapat bahawa kes terhadap pegawai itu menghendaki penjelasan selanjutnya, Jawatankuasa Tatatertib itu boleh melantik Jawatankuasa Penyiasat yang terdiri daripada tidak kurang daripada dua orang pegawai Lembaga yang lebih kanan daripada pegawai yang di bawah penyiasatan.

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And third, reg 28(7), which provides, with the necessary emphasis:

> Jika saksi-saksi dipanggil dan diperiksa oleh jawatankuasa penyiasatan itu, pegawai itu hendaklah diberi peluang untuk hadir dan untuk menyoal saksi-saksi itu bagi pihak dirinya sendiri dan tiada keterangan documentar boleh digunakan terhadapnya melainkan jika pegawai itu telah sebelum ini dibekalkan dengan suatu salinan keterangan dokumentar itu atau diberikan akses kepadanya.

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[27] From the above provisions it is clear that the establishment of an investigation committee may be made under reg 28(4) of the disciplinary rules. It provides that if the disciplinary committee considers that a case against an officer requires further clarification, it may establish an investigation

committee for the purpose of obtaining such further clarification.

[28] In a disciplinary proceeding initiated under reg 28, such an opportunity to be heard orally can only arise under reg 28(4) at the 'investigation committee' stage. It is only if an investigation committee is appointed because the disciplinary committee required further clarification that the officer will be afforded the opportunity of giving oral testimony to exculpate himself (see *Ganasan Marimuthu v Public Services Commission & Anor* [1998] 4 MLJ 280; [1998] 4 CLJ 331).

[29] Regulation 28(7) provides that if witnesses are called and examined by the investigation committee, the officer should be allowed to be present and to cross-examine the witnesses and no documentary evidence should be used against the officer unless the officer has previously been supplied with a copy of the evidence. This is consistent with the basic concept of natural justice, which is built upon the well-known adage that no one should be condemned unheard (see *Administrative Law of Malaysia and Singapore* (3rd Ed) by Professor MP Jain at p 226).

[30] The fundamental question which we must then ask here is: whether the investigation committee pursuant to reg 28(4) of the disciplinary rules had been established by the disciplinary committee for the purpose of obtaining further clarification?

[31] This then brings into sharp focus the contention of learned counsel for the plaintiff to the effect that the defendant had made unequivocal admission in his statement of defence as regard the formation of the investigation committee and calling of witnesses to take further evidence. To this end, learned counsel then took us through the defendant's statement of defence. In particular he brought to our attention paras 8.1 and 8.2, which read:

> 8.1 Tambahan kepada itu, Defendan menyatakan bahawa Encik Madzlan bin Abdul Rahman telah juga diminta untuk hadir untuk memberi keterangan berkenaan dengan surat akuan bersumpah yang kononnya teiah ditandatangani olehnya pada 9 September 2000 dan surat bertarikh 6 September 2000 tetapi beliau telah enggan untuk berbuat demikian.
>
> 8.2 Walau bagaimanapun, Encik Madzlan bin Abdul Rahman telah enggan untuk hadir dan memberi pengesahan sama ada beliau telah menandatangani surat dan surat akuan tersebut walaupun cukup notis telah diberi kepadanya.

[32] Given the above averments, learned counsel argued that a witness could only be called to testify under reg 28(7) of the disciplinary rules when an investigation committee was formed under reg 28(4) of the disciplinary rules.

This is the essence of his contention. On the basis of the explicit admission in paragraphs 8.1 and 8.2 of the statement of defence, he argued that the investigation committee was in actual fact established for the purpose of obtaining further clarification and that witnesses were called to give evidence before the investigation committee. Considered in that way, learned counsel argued that the plaintiff was not notified of the date and time of the inquiry before the investigation committee and for that reason, he added, the plaintiff was not given the opportunity to be present at the hearing of the investigation committee, and the plaintiff was deprived of the right to cross examine the witnesses and also to produce any witnesses or evidence to rebut, contradict or explain further to the investigation committee. As a result, he submitted, the disciplinary proceedings against the plaintiff had infringed reg 28(7) of the disciplinary rules.

[33] Relying on *B Surinder Singh Kanda v The Government of The Federation of Malaya* [1962] 28 MLJ 169, *Shamsiah bte Ahmad Sham v Public Services Commission, Malaysia & Anor* [1990] 3 MLJ 364 and *Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v Setiausaha Suruhanjaya Pasukan Polis & Ors* [1995] 1 MLJ 308, learned counsel for the plaintiff submitted that it is trite law that procedural fairness dictated that evidence should not be taken behind the plaintiff's back. Hence, he submitted that the disciplinary proceedings resulting in the plaintiff's dismissal was flawed because there were serious breach of the rules of natural justice and serious breach of mandatory procedures.

[34] It has to be highlighted at this point that no report of the alleged investigation committee was ever adduced in evidence. In this regard, it is important to bear in mind that all the documents from pp 488–557 of part B of the record of appeal (save for pp 536 and 537) pertaining to the alleged establishment and inquiry of the investigation committee were excluded by this court on 26 January 2015 when the defendant's application to strike out the record of appeal was dismissed on the ground that those documents were not part of the trial evidence before the High Court; it should not therefore have been included in the record of appeal.

[35] In this respect, it is pertinent to note that the High Court made a factual finding that 'there is no evidence to show that an investigation committee was appointed. This is corroborated by the fact that there is no mention whatsoever of any investigation committee in the disciplinary committee's letter dated 17 May 2001'. To which we will add that a person who asserts the existence of any fact must prove that the fact exists (see *Syarikat Kemajuan Timbermine Sdn Bhd v Kerajaan Negeri Kelantan Darul Naim* [2015] 3 MLJ 609; [2015] 2 CLJ 1037).

[36] This leaves us therefore to consider this crucial question: whether, on the basis of the pleadings alone, a finding can be made that an investigation committee was in fact established as asserted by the plaintiff pursuant to reg 28(4) of the disciplinary rules?

[37] In refuting the contention of the plaintiff that an investigation committee had in fact been established, learned counsel for the defendant submitted that in the first place the approach taken by the plaintiff in the present case differed entirely from his pleaded claim. Learned counsel referred to para 22 the plaintiff's statement of claim, which read:

> Plaintiff menyatakan bahawa tindakan Defendan telah melanggar peruntukkan 28 Peraturan-Peraturan Pegawai LPP (Kelakuan Tatatertib 1994) iaitu Defendan gagal menubuhkan jawatankuasa siasatan dan gagal memanggil saksi-saksi untuk diperiksa dan disoalbalas.

[38] He pointed out that the plaintiff's pleaded claim was that the defendant had breached reg 28(4) of the disciplinary rules when it failed to establish an investigation committee for the purpose of obtaining further clarification by way of examining witnesses. To put the point differently, the plaintiff's pleaded case was about the non-application of reg 28 of the disciplinary rules, whereas the plaintiff's position before this court was that an investigation committee under reg 28 was established and that he was not called upon to attend it.

[39] To support his submission that a court should not decide an issue that is not pleaded, he brought to our attention the case of *Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152; [1990] 1 CLJ (Rep) 330.

[40] In our view, there is merit in the submissions of learned counsel for the defendant. It is a well-settled legal principle that the court should not decide on an issue that was not pleaded by the parties as had been decided in *Yew Wan Leong v Lai Kok Chye* where the Supreme Court cited *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196 and agreed with the following passage of Sharma J which stated:

> The court is not entitled to decide a suit on a matter on which no issue has been raised by the parties, it is not the duty of the court to make out a case for one of the parties when the party concerned does not raise or wish to raise the point. In disposing of a suit or matter involving a disputed question of fact it is not proper for the court to displace the case made by a party in its pleadings and give effect to an entirely new case which the party had not made out in its own pleadings. The trial of a suit should be confined to the pleas on which the parties are at variance.

[41] We should remind ourselves that parties to an action are bound by their own pleadings. It is therefore necessary to make the point that the court is also

bound by the pleadings in as much as the parties themselves. The most important purpose of pleadings is to plead reasonable cause of action, define the issues of fact and questions of law to be determined by the court. It is a valid argument to make that the court is constrained to decide an action on which no issue has been raised by the parties in their respective pleadings (see *Ambank (M) Bhd v Luqman Kamil bin Mohd Don* [2012] 3 MLJ 1; [2012] 3 MLRA 459 and *Victory Avenue Mfg (M) Sdn Bhd v Matsushita Electronic Devices (M) Sdn Bhd* [2009] 5 MLJ 243).

[42] Still most importantly to note, paras 8.1 and 8.2 in the defendant's statement of defence, as being the key plank in establishing the plaintiff's case for there existing an investigation committee, had been tellingly denied by the plaintiff himself at para 5 of his reply to the defendant's statement of defence:

> Melainkan apa yang telah sebelum ini diakui, Plaintif menafikan setiap satu dan semua tuduhan yang terkandung di dalam Pernyataan Pembelaan.

[43] The basic fact that can be gleaned from the above is that a factual assertion made by the defendant in paragraphs 8.1 and 8.2 in its statement of defence was responded to by way of a general traverse in the plaintiff's statement of reply when he averred that except where previously admitted, the plaintiff denied each and every allegation contained in the defendant's statement of defence.

[44] In the context of the present case, what then is the effect of the general traverse or the seriatim clause?

[45] Order 18 r 13 of the Rules of the High Court 1980 (equipollent with the present Rules of Court 2012) is relevant, and provides a good starting point:

> 13. (1) Subject to paragraph (4), any allegation of fact made by a party in his pleading is deemed to be admitted by the opposite party unless it is traversed by that party in his pleading or a joinder of issue under rule 14 operates as a denial of it.
>
> (2) A traverse may be made either by a denial or by a statement of non-admission and either expressly or by necessary implication.
>
> (3) Subject to paragraph (4), every allegation of fact made in a statement of claim or counterclaim which the party on whom it is served does not intend to admit must be specifically traversed by him in his defence or defence to a counterclaim, as the case may be; and general denial of such allegations or a general statement of non-admission of them is not a sufficient traverse of them.

[46] From the above provisions, it can be seen that a traverse operates to

deny an allegation of fact. As a matter of broad general principle, the effect of a general traverse is to deny each and every factual allegation raised by the opposing party (see *Borneo Housing Mortgage Finance Bhd v Personal Representatives of the Estate of Lee Lun Wah Maureen & Anor* [1994] 1 MLJ 209; [1994] 1 CLJ 501, *John Lancaster Radiators Ltd v General Motor Radiator Co Ltd and Others* [1946] 2 All ER 685 and *Warner v Sampson* [1959] 1 QB 297).

[47] In the result, therefore, as things stood, the obvious consequence of the general traverse contained in para 5 of the plaintiff's statement reply was to deny the defendant's factual allegation that an investigation committee was in fact established. It has to be pointed out that the plaintiff's denial of the establishment of the investigation committee was in direct contradiction of its present contention that an investigation committee was in fact formed under reg 28(4) of the disciplinary rules.

[48] This then brings us to the submissions of learned counsel for the plaintiff that as a result of the general traverse, the onus of proof had shifted to the defendant to prove that the investigation committee was in fact established for the purpose of obtaining further clarification by way of examining witnesses. With respect, we are not persuaded with this line of arguments. For the purposes of this appeal, it is necessary to bear in mind that from the outset it was upon the plaintiff himself, and certainly not the defendant, to discharge the overall burden of proving his case and satisfy the court on a balance of probabilities that his claim as pleaded in the statement of claim was well founded before the court could grant judgment in his favour (see *Syarikat Kemajuan Timbermine Sdn Bhd v Kerajaan Negeri Kelantan Darul Naim*). The stand taken by the defendant not to prove the said averments was of the defendant's choice. However, that did not absolve the plaintiff from discharging the overall burden of proving his claim.

[49] Even more significantly, as submitted by the defendant's learned counsel, the plaintiff in his statement of reply did not make any admission against the facts averred in the defendant's statement of defence. To be more specific, the plaintiff did not admit paras 8.1 and 8.2 of the statement of defence to support his contention that an investigation committee was in fact established and that he was not called for the hearing. We should also note that it would be a different thing if the plaintiff admitted to those paragraphs in his statement of reply. But most problematically, and it gets worse for the plaintiff when he denied the said paras 8.1 and 8 February The contradiction was never fully resolved. To be sure, what all the statement of reply contained was merely a series of denials and a general traverse clause at the end. In truth, the tenor and thrust of the plaintiff's statement of reply is a total rejection of the defendant's factual averments.

[50] In our judgment, the defendant's averments in paras 8.1 and 8.2 of the statement of defence ultimately have no bearing on the plaintiff's case. The fact that the defendant pleaded in that fashion did not alter the fact that the plaintiff's pleaded case was his dissatisfaction with the non-formation of the investigation committee. Now, before this court, the plaintiff was trying to argue something quite different from his pleaded case without even the support of evidence. But as we have said earlier, the law is trite that the court should not decide an issue, which was not pleaded by the parties.

CONCLUSION

[51] In light of our findings and in the circumstances of this case, there is no necessity for us to answer the question as framed. In consequence, this appeal must fail. We accordingly dismiss it.

[52] This judgment is prepared pursuant to s 78(1) of the Courts of Judicature Act 1964, as our learned brother, Justice Apandi Ali FCJ had since resigned upon his appointment as the Attorney General of Malaysia.

Appeal dismissed.

Reported by Ashok Kumar